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JOHN F. DAVIS,

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 490

SAMUEL H. SHEPPARD,
PETITIONER,

v.

E. L. MAXWELL, WARDEN,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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Opinion Below

The opinion of the Court of Appeals (Rs. 1-113) is reported at 346 F.2d 707.

Jurisdiction

The judgment of the Court of Appeals was entered May 5, 1965 (Rs. 1). A petition for a writ of certiorari was

filed in this Court on Aug. 24, 1965, and was granted Nov. 15, 1965. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

Questions Presented

1. Did the pre-trial publicity in petitioner's case so prejudice the community that no fair and impartial jury could have been impanelled?

2. Did the trial judge fail to adequately protect the petit-jury, once impanelled, from prejudicial extrinsic influence?

3. Did the trial judge fail to adequately interrogate the jurors when they had been exposed to prejudicial extrinsic matter through the news media during trial?

4. Did the trial judge fail to maintain constitutionally adequate decorum in the courtroom during trial?

5. Did the trial judge deny petitioner a public trial by assigning nearly all of the seats in the courtroom to newsmen?

6. Did the trial judge, in the special circumstances of this case, violate petitioner's constitutional right to a fair and impartial judge by failing to recuse himself despite his firm belief, undisclosed to petitioner, that petitioner was "guilty as hell" and that the case against him was "open and shut"?

7. Did the trial judge violate petitioner's federal constitutional right against self-incrimination by receiving evidence that petitioner had refused to take a lie detector test and truth serum?

8. Did the action of the bailiffs who permitted jurors to telephone outsiders during the course of deliberations in violation of Ohio law violate petitioner's federal constitutional right to a fair and impartial trial?

9. Did the court below deprive petitioner of proper review of other claimed federal constitutional violations?

10. Did the court below improperly foreclose without litigation the question of the sufficiency of the evidence?

11. Did the court below erroneously rule that no combination of individual errors, none of which rises to the stature of a federal constitutional violation, can in the aggregate show that the state court trial fell short of the requirements of due process of law?

Constitutional Provisions and Statutes Involved

Constitution of the United States

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall

private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Statutes

SECTION 2505.21, OHIO REVISED CODE. *Hearing on Appeal.*

"Appeals taken on questions of law shall be heard upon assignment of error filed in the cause or set out in the briefs of the appellant before hearing. Errors not argued by brief may be disregarded, but the court may consider

and decide errors which are not assigned or specified. Failure to file such briefs and assignments of error within the time prescribed by the court rules is cause for dismissal of such appeal. All errors assigned shall be passed upon by the court, and in every case where a judgment or order is reversed and remanded for a new trial or hearing, in its mandate to the court below, the reviewing court shall state the errors found in the record upon which the judgment of reversal is founded. * * * "

SECTION 2945.21, OHIO REVISED CODE. *Peremptory challenges in capital cases.*

"On the impaneling of a jury in a capital case, the state and the defendant, if there is only one defendant, may each peremptorily challenge six of the jurors, which challenges shall be exercised alternately. If there is more than one defendant, each defendant may peremptorily challenge six of the jurors, and the state may peremptorily challenge a number equal to the combined number allowed to all the defendants. Neither the state nor a defendant may be deprived of any of the challenges by reason of such order of exercising the same, or the time or manner of exercising the same."

SECTION 2945.29, OHIO REVISED CODE. *Jurors becoming unable to perform duties.*

"If, before the conclusion of the trial, a juror becomes sick, or for other reason is unable to perform his duty, the court may order him to be discharged. In that case, if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged. If, after all alternate jurors have been made regular jurors, a juror becomes too incapacitated to perform his duty, and

has been discharged by the court, a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or thereafter impaneled."

SECTION 2945.32, OHIO REVISED CODE. *Oath to officers if jury sequestered.*

"When an order has been entered by the court of common pleas in any criminal cause, directing the jurors to be kept in charge of the officers of the court, the following oath shall be administered by the clerk of the court of common pleas to said officers: 'You do solemnly swear that you will, to the best of your ability, keep the persons sworn as jurors on this trial, from separating from each other; that you will not suffer any communications to be made to them, or any of them, orally or otherwise; that you will not communicate with them, or any of them, orally or otherwise, except by the order of this court, or to ask them if they have agreed on their verdict, until they shall be discharged, and that you will not, before they render their verdict communicate to any person the state of their deliberations or the verdict they have agreed upon, so help you God.' Any officer having taken such oath who willfully violates the same, or permits the same to be violated, is guilty of perjury and shall be imprisoned not less than one nor more than ten years."

SECTION 2945.33, OHIO REVISED CODE. *Keeping and conduct of jury after case submitted.*

"When a cause is finally submitted the jurors must be kept together in a convenient place under the charge of an officer until they agree upon a verdict, or are discharged by the court. The court may permit the jurors to separate during the adjournment of court overnight, under proper

cautions, or under supervision of an officer. Such officer shall not permit a communication to be made to them, nor make any himself except to ask if they have agreed upon a verdict, unless he does so by order of the court. Such officer shall not communicate to any person, before the verdict is delivered, any matter in relation to their deliberation. Upon the trial of any prosecution for misdemeanor, the court may permit the jury to separate during their deliberation, or upon adjournment of the court overnight."

Statement

In July 1954 Dr. Samuel H. Sheppard (petitioner herein) resided in Bay Village, a suburb of Cleveland, Ohio, on the south shore of Lake Erie. He was thirty years of age, and was a practicing osteopathic neurosurgeon. His two older brothers, Richard and Stephen, and his father, were also physicians and surgeons, and together the four Sheppards operated the Sheppard Clinic; in addition, all were on the staff of the Bay View Hospital in Bay Village.

On the evening of July 3, 1954, petitioner and his wife, Marilyn, also thirty years of age, were at home with their seven-year-old son. Visiting the Sheppards on that evening were friends named Don and Nancy Ahearn. The two couples conversed, listened to the radio and watched television; the evening was congenial, and there was no indication of hostility or discontent between Dr. and Mrs. Sheppard, who was pregnant at the time. At some point prior to midnight, Dr. Sheppard fell asleep on a couch in the downstairs living room. Marilyn Sheppard bade the Ahearns good-night at 12:30 a.m. on July 4, 1954; she was never seen alive again.

Shortly before six o'clock that same morning, J. Spen-

cer Houk, who was then Mayor of Bay Village and also a friend of the Sheppards, received a telephone call at his home, only two doors distant from that of Dr. Sheppard. Houk recognized the caller as petitioner, and heard him exclaim: "My God, Spen'—come quick! I think they've killed Marilyn!" Houk arose and dressed, as did his wife Esther; they drove their automobile the few hundred feet to the Sheppard home, and entered to find Dr. Sheppard on the floor. His face was bruised, and he complained of pain in his neck. Esther Houk went to Marilyn's bedroom on the second floor, and found Marilyn lying on her bed her head in a pool of blood. She was dead. She had been struck some thirty-five blows by a blunt instrument which has not to this day been ascertained. The time of her death was the subject of conflicting medical evidence at the trial.

No witness has ever appeared, other than petitioner, purporting to have knowledge of what occurred between the departure of the Ahearns and the arrival of the Houks. Petitioner's account of the intervening hours, as given to interrogators and subsequently as testimony, is substantially as follows.

At some time during the night Dr. Sheppard was awakened from his sleep on the downstairs couch by a noise coming from the second floor; he thought that he heard Marilyn call his name. Groggy from sleep, he ran up the stairs to his wife's bedroom, which was dimly lit by a light in the upstairs hall. He saw a "form" standing next to his wife's bed wearing some sort of white top; he could not distinguish whether the form was male or female. He attempted to attack or grapple with it, and was struck a blow on the back of the neck which caused him to lose consciousness. He had no way of estimating the time of this occurrence, except that it was dark.

He came to on the floor of the bedroom, and heard noises

on the floor below; he ran down the stairs, and chased a man through the screen door on the side of the house abutting Lake Erie. He pursued this person to the shore of the lake, wrestled with him, and was once more rendered unconscious. He regained consciousness on the sandy beach in front of his house, partly in the water. He ran to his wife's bedroom, checked her pulse and found none, then called Mayor Houk.

On the morning of July 4, 1954, petitioner's home was invaded by a swarm of investigators and police. Present were representatives of the Bay Village Police Department, the Cleveland Police Department, the Sheriff of Cuyahoga County, the County Prosecutor and the County Coroner. Interrogation of petitioner commenced in Bay View Hospital, to which he had been removed for treatment of shock, loosened teeth, facial bruises and a fractured cervical vertebra. It continued thereafter up to and beyond the day of his arrest on July 30, 1954. He was accused of having murdered his wife, which he flatly denied; he was asked to submit to a lie detector test, which he declined because of his physical condition after its operational principles had been explained to him.

The news media gave the "full treatment" to the entire incident, and during the first few days of the investigation many column inches and broadcast minutes were devoted to developments of and speculation upon the murder of Marilyn Sheppard. At this juncture, in the words of one who was at the time perhaps Cleveland's leader of the fourth estate, "The newspapers began to lose interest—except one." (Rs. 181)

This was, petitioner urges, the turning point in the Sheppard Murder Case. The Cleveland Press uncovered its "editorial artillery" (Rs. 188) and leveled it at Dr. Sheppard and the authorities who had failed to quickly wring a confession from him. In a series of system-

atically inflammatory and directive front-page banner-headed editorials (Rs. 115-127) that newspaper demanded and got (1) command of the investigation transferred to the Cleveland Police Department, (2) an extraordinary inquest, and (3) the arrest of Sam Sheppard. (Rs. 182-187)

Thereafter followed the indictment of petitioner (August 17, 1954) and his trial (October 18, 1954). Twenty-five days before trial there appeared in the Cleveland Press, the Cleveland Plain Dealer and the Cleveland News (since merged with the Press) the names of all 75 prospective jurors from which the petit jury was to be impanelled. (Ra. 298a)

At the trial, wherein petitioner was charged with the first-degree murder of his wife, the State of Ohio contended that petitioner's story was an incredible concoction, and that he had killed his wife because of an amatory interest in one Susan Hayes, a laboratory technician once employed at Bay View Hospital with whom petitioner admitted some intimacies a couple of months before his wife's death. Sheppard stuck to his story that some third person—or persons—had caused his wife's death, and he so testified. The jury retired to deliberate its verdict on December 17, 1954; on December 21, 1954, that jury returned a verdict of guilty of murder in the second degree.

Those additional facts germane to the issues argued in this brief will be set forth at the outset of each section of the argument to which they pertain.

Summary of Argument

I. Prejudicial Publicity.

(a) *Pretrial Publicity.* From the date of Marilyn Sheppard's murder on July 4, 1954, to the commencement of

the trial on October 18, 1954, the Cleveland community was saturated with publicity prejudicial to petitioner. All of the newspapers were critical of him, and whetted the public appetite for his conviction. Much that was never offered, and would have been inadmissible if offered, at trial, was published as fact by newspapers. The Cleveland Press instituted a calculated campaign for the purpose of having petitioner arrested, indicted, and convicted, which campaign was eminently successful. At its urging the county coroner called and held an inquest which was used to embarrass and ridicule petitioner, deprive him of his right to counsel, and sow more intensively the seeds of community hostility. The names of prospective jurors, with their addresses, were published in all Cleveland newspapers twenty-five days in advance of trial; this served, under the circumstances, to expose these jurors to highly prejudicial opinions and social pressures which tainted their impartiality. The District Judge correctly ruled that there could not have been assembled in Cleveland in 1954 a fair and impartial jury to hear and determine petitioner's case.

(b) *Publicity During Trial.* After denying petitioner's repeated motions for a continuance and a change of venue, the trial judge failed to sequester the jury. The news media continued the barrage of prejudicial publicity begun before trial, and the trial judge failed to adequately admonish the jurors to avoid exposure to this material. When specific news releases containing highly prejudicial and inadmissible fact and opinion, to which the jurors were exposed, were brought to his attention, the trial judge failed or refused to adequately investigate the possible effects of this extrinsic influence on the jury. The trial judge refused to grant a mistrial in several instances where such relief was warranted.

(c) *Disruption of the Trial by Newsmen.* The Supreme Court of Ohio correctly delineated petitioner's trial as a "Roman holiday" for the news media. The trial judge reserved almost the entire courtroom for newsmen, and admitted the general public only by special pass. There was in the course of the trial continual disruption and interference by newsmen, who showed no respect for the gravity of the proceedings they were to observe and report.

II. Bias of the Trial Judge.

Judge Edward Blythin, who presided at the Sheppard trial, had stated to two individuals before any evidence was presented that petitioner was "guilty as hell" and that his case was "open and shut." He was a candidate for reelection during the trial, and was subjected to laudatory publicity by the newspaper which most needed Dr. Sheppard's conviction, the Cleveland Press. He repeatedly made critical discretionary rulings in favor of the State. He allowed himself to be shown publicly exuding warm congratulations toward John J. Mahon, chief counsel for the State, who was also a successful candidate for the judiciary during trial.

III. Lie-Detector Evidence.

Two prosecution witnesses testified that Dr. Sheppard had refused to submit to a lie-detector test, although requested to do so by police. A third prosecution witness was permitted to testify that he *had* submitted to a lie-detector test. The trial judge refused to give an appropriate limiting instruction once this evidence was before the jury. The court below, in holding that the receipt of this testimony was the deliberate and tactical decision of Sheppard's trial counsel, have usurped the function of the Dis-

trict Court whose decision it is whether or not to assert waiver as a bar to otherwise appropriate habeas corpus relief.

IV. Illicit Communications to the Jurors.

During their deliberations, jurors were allowed to hold unmonitored telephone conversations with third persons. This was done in violation of an Ohio Statute which sanctions as felony the act of any court officer who permits such communication in the absence of express authorization of the trial judge. At the time these communications occurred, the jury was engaged in protracted deliberations which stretched to almost five days. The Christmas holidays were only a few days away, and community pressure sought a conviction. The presumption that proof of communications between jurors and third parties is prejudicial until their harmlessness is made to appear was disregarded by the majority below, which presumed the opposite.

V. Other Constitutional Violations.

The District Judge who released Dr. Sheppard on a writ of habeas corpus specifically reserved without decision, being unnecessary in the circumstances, several claimed violations some of which he thought to be of "significant merit." The court below dismissed these claims without articulated decision. One of these, arraignment in a capital case without counsel, is a clear constitutional violation by decision of this Court. Another, the seizure of petitioner's house, retention of possession of that house until after the trial was over, and concealment of evidence exculpating petitioner, clearly violated petitioner's federal constitutional rights to a fair trial and control of his own real estate.

VI. The Sufficiency of the Evidence.

There was presented at Dr. Sheppard's trial no sufficient evidence to sustain a conviction, and the appellate courts of Ohio which ruled to the contrary used a constitutionally impermissible standard in so doing. The court below relied upon a summary of the evidence compiled by the Court of Appeals of Cuyahoga County as being sufficient to show that this trial record is not barren of evidentiary support, which the said summary wholly fails to do. The paucity of proof against this petitioner is a further circumstance warranting a conclusion that he did not enjoy his constitutionally-protected right to a fair and impartial trial.

VII. The Accretion of Error.

The majority below incorrectly ruled that if no single claimed violation would warrant habeas relief, the aggregate could rise no higher than any individual error. Each claim of irregularity in a criminal case must be viewed against all of the circumstances in which it arose. Application of this principle to the case at bar requires the conclusion that this trial fell far below the minimum standards of due process.

Argument

I. The Petitioner Was So Thoroughly Tried and Convicted by News Media that a Fair Trial in the Courtroom Could Not and In Fact Did Not Occur.

A. *Introductory Note:* Certainly the primary issue in this case, and the issue of greatest general concern to our

courts, lawyers, and society is that of publicity tainting the trial. Although this Court has in earlier decisions dealt with the general question of invasive news media vitiating by their conduct a state criminal judgment, *Irvin* v. *Dowd*, 366 U.S. 717, *Rideau* v. *Louisiana*, 373 U.S. 723, *Estes* v. *Texas*, 381 U.S. 532, we believe that this case presents new and important questions somewhat different than those heretofore considered. Although *Irvin* and *Rideau* involved publicized confessions, and *Estes* turned on television within the confines of the courtroom, the Sheppard case embraces inherent vices at least as serious as, though somewhat different from, these former decisions.

In quantum of reported material, virulence of content and recklessness of method we believe the publicity in the case at bar to far transcend any other case heretofore decided by this Court. And in addition to this general condition, the petitioner here was further—and perhaps far more grievously—victimized by the deliberate, premeditated, specific malfeasance of one particular newspaper whose asserted purpose was to "get" Sam Sheppard. We think this admittedly strong claim to be demonstrable from the opinion and findings of the District Judge (Ra. 453a) and the record as a whole.

Our approach to the publicity issue, therefore, is on several distinct planes. We contend (1) that the pre-trial publicity produced the Sheppard trial and at the same time precluded the assembly of an impartial jury; (2) the publicity during trial prevented the maintenance of an impartial jury *if* one had been impanelled; and (3) the contrived and malicious conduct of the Cleveland Press before and during trial operated to deprive petitioner of due process of law even if no other news media had ever mentioned the Sheppard case.

B. *Publicity Before Trial:* Substantially all of the publicity printed in newspapers which appeared before trial is contained, as stipulated by petitioner and respondent in the District Court (Ra 297a), in the five green scrapbooks which are part of the record in this case. This is not to suggest that each Justice ought to examine these exhibits, for indeed this would be an unreasonable imposition; but inasmuch as the several lower courts which have reviewed this same evidence have come to startlingly different conclusions as to its content, counsel hasten to point out that although the articles upon which they place emphasis are necessarily selective, the whole is available for examination.

Although there is no direct evidence other than newsprint to prove the measure of publicity attendant upon this case, we respectfully suggest as a fair inference that other news media operative in 1954 (radio and television) generally accorded the matter coverage consistent with the interest evinced by the newspapers (although likely not the coverage given by the Cleveland Press).

The District Judge in his opinion set forth many of the articles and editorials which he thought to be most damaging (Ra 408a-447a). Additional material is reproduced in appendices to the dissenting opinion in the court below (Rs. 101-110). We have set forth some of this material, as it appeared to Cleveland readers in 1954, in the appendix to our petition for certiorari (Rs. 115-129). Although there is a plethora of additional newspaper evidence, we respectfully submit that this material alone is sufficient to determine the presented issues.

Also of significance are the opinions and conclusions of the numerous lower courts which have considered this case. In Ohio, the trial court—the Court of Common Pleas of Cuyahoga County—expressed a view upon the nature of the publicity, as did the Court of Appeals of

Cuyahoga County and the Ohio Supreme Court. Trial Judge Blythin, in denying a motion for new trial, wrote:

> "Seldom indeed has there been a case about which the average citizen was so confused by the published stories or more uncertain about what the facts actually were." (Ra 35a).

The Court of Appeals for Cuyahoga County wrote:

> "No case in this community ever attracted so much public interest or received so much attention by news disseminating agencies. Some of said publicity unquestionably was intended to spur on the investigation and was highly critical of the defendant and went so far in some instances as to have been designated in other newspapers as an attempt to try the case in the public press before he was indicted." (Ra 57a).

The Ohio Supreme Court described this publicity in terms that have become classic in the years that have intervened, and with language which would lead even the most naive law student to think that the majority were announcing a reversal:

> "Bell, J. Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. Special seating facilities for reporters and columnists representing

local papers and all major news services were installed in the courtroom. Special rooms in the Criminal Courts Building were equipped for broadcasters and telecasters. In this atmosphere of a "Roman holiday" for news media, Sam Sheppard stood trial for his life." (Ra 110a).

Three federal judges have now passed upon the nature and extent of the publicity in this case. District Judge Weinman, in ordering Dr. Sheppard's release, observed that:

(Ra 436a) "Suffice it to say that each of the three Cleveland newspapers repeatedly printed material which strongly suggested petitioner's guilt. Indicative of the suggestion of guilt was the repeated and extensive coverage given to petitioner's refusal to submit to a lie detector test or to receive an injection of truth serum."

* * *

"And particular mention must be made of the editorial in the Cleveland Press titled "BUT WHO WILL SPEAK FOR MARILYN" which was printed just prior to the swearing in of the jury, for it was indeed one of the most prejudicial. Ignoring the fact that it was a cheap, sobsister editorial, it literally screamed for petitioner's conviction."

(Ra 442a) "This Court * * * has no compunction in finding that the publicity was so prejudicial to petitioner that the assurances of the jurors must be disregarded for in the words of Mr. Justice Frankfurter, 'before they (the jurors) entered the jury box, their minds were saturated by press and radio * * * designed to establish the guilt of the accused.' "

(Ra 450a) "If ever there was a trial by news-

paper, this is a perfect example. And the most insidious violator was the Cleveland Press. For some reason that paper took upon itself the role of accuser, judge and jury. The journalistic value of its front page editorials, the screaming, slanted headlines and the nonobjective reporting was nil, but they were calculated to inflame and prejudice the public."

(Ra 455a) "By its actions in the Sheppard case, the Cleveland Press showed no respect for its responsibilities. If ever a newspaper did a disservice to its profession, if ever the cause of freedom of the press was set back, this was it. The failure of that newspaper and two other Cleveland newspapers to adhere to their responsibilities cannot be permitted to deny petitioner his right to a fair trial."

Circuit Judge Edwards, concurring fully with Judge Weinman's conclusions, described that publicity in various instances as follows:

(Rs. 59) "If ever a flagrant and tolerated interference of news media in a criminal trial served to deprive a defendant of his constitutional rights to due process and a fair trial, this surely must be such a case."

(Rs. 60) "A number of the most important and most prejudicial of the news media communications were drawn from sources completely outside of the trial record. These were not just news media inaccuracies or debatable comments in reporting court proceedings, they represented deliberate and highly prejudicial supplementation of the trial record."

(Rs. 60) "In a trial atmosphere which the Supreme Court of Ohio described as a 'Roman holiday

for the press', the news media were frequently allowed to become the dominant factor in a courtroom where a defendant was on trial for his life. The judge who presided at this trial repeatedly professed his inability to control these events."

(Rs. 64) "The Cleveland Press in front page headlines, editorials and cartoons berated official slowness, demanded an inquest, condemned the 'protection' of the 'chief suspect,' demanded the entrance of the Cleveland Police Department into the investigation, and demanded the arrest and the 'grilling' of defendant at police headquarters.

The inquest, the investigation by the Cleveland Police Homicide Unit, and the defendant's arrest and "grilling" followed hard on the heels of these demands.

Later, a representative of the Cleveland Press made the public boast that the Cleveland Press' handling of the Sheppard story produced the trial."

(Rs. 81) "If ever a jury could be said to be likely to have been 'impregnated by the environing atmosphere,' it was surely this jury."

(Rs. 82) "But on these same crucial issues, as the trial progressed the news media supplemented the total record with material never heard in the courtroom. Much of this material, though highly prejudicial to the defendant, was relevant and admissible if a witness could have been found who was prepared to testify to it under oath in the courtroom and face cross-examination. Some material, though equally prejudicial, was obviously inadmissible under any circumstances."

And the majority opinion of the court below, to which two Judges have subscribed, acknowledged that:

(Rs. 5) ". . . notwithstanding our agreement with the District Judge's characterization of the conduct of some of the Cleveland press as being shameful journalism, certainly not conducive to the judiciary's continuing concern for the freedom that the press insists should at all times be accorded to it. Contemporary American society would be greatly benefited if those members of the press and other media of information who offend in this regard were as conscious of and devoted to their responsibilities as they are solicitous that their privileges remain unimpaired. Good would also be the product of greater restraint by prosecutors and other members of the bar who indulge in public and truculent announcement of their trial plans and ammunition."

(Rs. 14) "Certainly little sophistication was required for a reader to become aware that the Cleveland Press entertained strong suspicion that Dr. Sheppard had killed his wife, although at times the Press suggested that Sheppard should clear suspicion from himself by submitting to adequate questioning. All of this was indeed stated in more violent and colorful language than we employ in attempting to summarize it."

(Rs. 15) "Certainly the Cleveland Press' discharge of its claimed duty in the Sheppard case could have been adequately pursued with less obtrusiveness. We need not here decide whether the Bay Village authorities, or the Cuyahoga County coroner or the Cleveland Police did or did not need the urging provided by the Cleveland Press. It has not been asserted that the police authorities were not without the faults charged to them, although it might fairly be inferred that the Press' meddling probably impeded more than it helped."

(Rs. 23) "We have emphasized that the publicity involved in the present case was not of a nature calculated to inspire confidence in the objectivity and good taste of the public news media."

(Rs. 32) "We wonder whether the flamboyant and sometimes shabby pretrial exhibitions of the press in this case . . ."

Petitioner does not hesitate to take the position that upon the facts which respondent is estopped to deny as a judgment of his highest court—that this trial was conducted in an "atmosphere of a 'Roman holiday' for news media"—the conviction must fall. Certainly all that is implicit in the bacchanalia of a "Roman holiday" is directly out of phase with the serious and ordered decorum which is supposed to be the controlling environment of our American criminal trials. And, notwithstanding the attempt of the majority of the court below to buttress its opinion with this Court's denial of certiorari in 1956, we believe that a recognition of this fact is solidly rooted in Mr. Justice Frankfurter's memorandum opinion explaining that denial (352 U.S. 910, 911); for after noting and quoting Judge Bell's now famous paragraph, he wrote that "such denial of (Sheppard's) petition *in no wise implies* that this Court approves the decision of the Supreme Court of Ohio." (Emphasis supplied)

Finally, as a factual premise to which our present argument will relate, we point to the role of the Cleveland Press and other news media as is singularly revealed by the statement of Editor Seltzer (Rs. 180-188). If the bull tactics of the Press prodded elective enforcement officials to action which they would otherwise not have initiated, certainly the echoing publicity of sister publications contributed to the general effective pressure.

We pause at this juncture to define the limits of our

argument. We do not suggest a wholesale shackling of the press as an appropriate remedy to insure fair trials. There may indeed be situations where the powers which flow from the First Amendment to our constitution are the only means by which corrupt officialdom can be brought to book. And in cases where the unrestrained juggernaut of a well-intended but misguided free press operates to deprive a citizen of his right to a fair trial, the courts have power to correct a tainted judgment. If there is, as scholars and learned judges now with increasing frequency suggest, a great collision between those paramount forces of the First and Fourteenth Amendments, there is at least some saving grace in the fact that the operation of the latter is always second in time, and abuses resulting from the unchained might of a free press may, in criminal cases at least, finally yield to the supervening corrective force of a dispassionate judiciary not forced to act in haste or in deference to measured deadlines. We thus concede that in appropriate instances news media may, and indeed ought to, cast their single or collective harsh light upon shady official conduct. If through misjudgment or premature castigation some injustice befalls a citizen, the courts can in part correct the wrong and the balance of grief may be laid to the price we pay for the division of powers which promotes and maintains our democracy.

But with these principles in mind, we similarly suggest that the considerable power with which a free press is invested is not entirely free from responsibility. Surely there can be found some limitations within whose perimeter news media can be required to function without materially diminishing that power necessary to their ability to attack and expose when the public is being duped by irresponsible official conduct.

To define this responsibility is no easy task. No facile

verbiage can set the limits upon a power as tremendous as that which our First Amendment embodies, for chains such as these must be carefully forged. And yet in the discharge of their responsibility and the exercise of their power the news media ought to be informed, by the tribunal which will belatedly but ultimately pass upon the propriety of their labors, what restrictions (if any) there may be.

Although several years' wrestling with the manifold and complex press — due process questions inherent in the Sheppard case tempt one to formulate a whole new set of rules governing the conduct of news media in criminal cases, the wisdom of the policy of this and other courts of last resort to avoid decision of problems not squarely presented is inescapable. We therefore suggest, in all humility, since this troublesome jurisprudential area is but vaguely charted two minimal standards below which the dip of news media ought to be sharply condemned:

> First, any deliberate and contrived effort on the part of a newspaper, radio or television station to cause or effect the prosecution of a citizen against whom no legitimate evidence, suppressed by authorities, can be shown to exist; or,
>
> Second, utterly reckless conduct on the part of news media which demonstrates a complete disregard for the rights of the citizen under attack.

These are, we believe, the lessons of the Sheppard case. Against all those newsmen in the Cleveland area who, although not the initiators of a personal attack on petitioner nonetheless risked irresponsibly the rights of Dr. Sheppard to a reasonably impartial jury in their efforts to capture first prize for the day in the competition for the most venal handiwork, we think the charge of recklessness

to be legitimately and dispassionately brought. As one example of such inexcusable recklessness, we submit the cartoon published by the Cleveland Plain Dealer on August 5, 1954, depicting petitioner as a Sphinx blandly but unconcernedly offering to help ascertain his wife's killer. No justification for this cheap bit of derision has ever been vouchsafed by any proponent of the Sheppard conviction, and it lives as proof that there exist in this country, as always, the pathological cowards who step boldly only to kick a man who is already down. The publication of this cartoon we cite as an example of recklessness. Examination of the other publicity extant in this case will disclose many more.

We think the allegation of deliberate malice to be suitably supported against the Cleveland Press. That paper did, as the District Judge has found, for some reason appoint itself to be accuser, judge and jury in this case. Its consciousness of the vulnerability of elective officials who would jump through hoops to win its support and avoid its displeasure is chillingly spelled out in Mr. Seltzer's autobiography, Chapter 26, set forth in the appendix to our petition for certiorari (Rs. 180-188). Against this kind of intimidation and control no sworn representative of the people had the gumption to stand, and as each mandate was sent down by the Press officialdom swiftly complied. We sincerely contend—and we read Chapter 26 of "The Years Were Good" (Rs. 180-188) to strongly endorse our position—without the deliberate pressure of the Cleveland Press there would have been no inquest, no arrest and no trial. Mr. Forrest Allen, one of the Press' most active reporters in the Sheppard case, said on radio (Station WHK in Cleveland, see Cleveland Plain Dealer, October 19, 1954) while the jury was being selected that the efforts of the Press had "produced the trial going on today."

We pause at this moment to direct attention at the response of the majority of the court below, whose judgment we attack, to this admitted interference by an agent of the Cleveland Press. In its opinion, the majority disclaimed recognition that such an utterance had ever occurred. (Rs. 15, n.5) The Dissenting Judge, however, noticed these remarks by Reporter Allen and laid stress upon "this public boast". (Rs. 64) When it was pointed out in our petition for rehearing that this boast was indeed part of the evidence documented in the case (pet. reh. 20) the majority amended its opinion by substituting for its earlier remark (Rs. 15, n.5) the following:

> "We cannot accurately assess the Press' self-evaluation of its own journalistic prowess." (Rs. 111)

We do not of course criticize the failure of the majority to note as fact Mr. Allen's remark in its original consideration of the case, for the morass of material before it offered great opportunity for such oversights. But faced with its mistake and with an admission by a primary agent of the newspaper found by the District Judge to have deliberately violated defendant's right to a fair trial, we respectfully suggest that the court below had a duty to do something more than assert its inability to "assess" this critical matter. Certainly this amended footnote does little to resolve the question, never squarely faced by the court below, of whether a trial "produced" by a newspaper can be or is in the circumstances consistent with due process.

The majority of the court below have emphasized, in distinguishing the case at bar from other cases involving pretrial publicity (cf. *Irvin* v. *Dowd*, 366 U.S. 717; *Rideau* v. *Louisiana*, 373 U.S. 723) that there was no publication of a *confession* by the defendant and thus no prejudice.

With this view we respectfully disagree. To borrow the most appropriate term from the opinion of the District Judge (Ra 453a), the prejudicial material levelled against Dr. Sheppard was "insidious" in every sense of that word. Boiled down from innuendo to essence, it suggested that although he was guilty he had secreted the evidence, and thus community protection demanded his conviction *unless he could prove* his "fantastic" story. With this seemingly logical but legally outrageous approach to an evidentially-scant case, the news media literally transferred the burden of proof to petitioner—a burden which he failed (but only partially, since this was obviously a compromise verdict by an uncertain jury (cf. Rs. 65)) to carry. We think that Dr. Sheppard on the eve of trial found himself in every bit as unfortunate a position as do defendants victimized by news revelation of alleged confessions or criminal histories *(Marshall* v. *United States,* 360 U.S. 310).

This Court has recognized that psychological pressure can be at least as effective as physical coercion in producing forced confessions. *(Spano* v. *New York,* 360 U.S. 315; *Rogers* v. *Richmond,* 365 U.S. 534) Application of this principle to the issue at bar compels the conclusion that subtle and insidious insinuations of guilt may go further toward prejudicing the citizenry than the publication of confessions, for these produce the gnawing fear that someone is "getting away with something" and promote a conscious or subconscious willingness to convict. The repeatedly asserted notion that Dr. Sheppard because of his influence, position and "hired" lawyers was blocking the discovery of evidence which would sew up the case against him prepared psychologically the attitude of the community for his conviction on scant proof. The notion of *confession* was everywhere implicit in the news articles and editorials; except in this case no articu-

lated confession was announced, as in *Irvin* and *Rideau*. The "confession" in petitioner's case was the one which officials through news media publicly claimed to be locked within Sam Sheppard's guilty mind, there to remain unless he could be subjected to an appropriate "grilling" (Rs. 116) by "third-degree" methods (Rs. 121).

Although police did eventually get to conduct their grilling interrogation—at length and with great vigor—no confession resulted. This failure to extract a statement of guilt was attributed to the delays suffered by those worthies who advocated this one method of crime solution as the sole logical and proper approach, and the notion that petitioner's confession, though unreachable because of his craftiness, was extant nonethless, was never dissolved. We believe the court below to have made a fundamental error in failing to recognize that a confession claimed publicly to be hidden can be every bit as damaging to an accused facing trial as a confession claimed to have been articulated.

In this argument directed to pre-trial publicity, we mention two additional specific instances: the inquest demanded by the Press and conducted by the coroner, and the publication of a complete list of veniremen twenty-five days in advance of trial.

The "inquest" in this case was a three-ring circus staged by Cuyahoga County Coroner Samuel Gerber to pacify the ranting of the Cleveland Press (Rs. 117). No other reasonable explanation for this proceeding can be proffered, since inquests are conducted to determine cause of death, and whether homicide is involved—hardly a question in this case from the first moment of the investigation. We assume that Dr. Gerber (who was and is a member of the Bar of the State of Ohio) had not called an inquest during the initial stages of the investigation because it obviously could not serve any useful purpose.

And it is apparent that the Press, which had been loud invoicing its disappointment in the failure of authorities to subject petitioner to the kind of rubber-hose interrogation which it repeatedly demanded, had thought an inquest an ingenious method to forcibly question Sam Sheppard under oath. As Mr. Seltzer has told us, Dr. Gerber scampered obediently into action to initiate the Press' scheme (Rs. 185).

The inquest was not held in the County morgue, but in a school gymnasium in Bay Village. At trial Dr. Gerber explained that he chose this locale because he wanted to have an audience (Tr. 3453) and because he wanted to "satisfy" the people (Tr. 3452). The possible or probable prejudice to petitioner apparently was not of concern to the coroner.

Sam Sheppard was called and made to testify; Sam's counsel was ejected, forcibly, from the proceedings because he had the temerity to object to the coroner's methods. Drs. Steve and Sam Sheppard were searched, in full view of the audience, as they entered the room.

The lady spectators were so enthralled by the nobility of Coroner Gerber's ejection of Defense Attorney Corrigan that they ran up to him and hugged and kissed him—a fact specifically noted by the District Judge (Ra 443a).

We mention the outrageous nature of this unnecessary sham proceeding because we believe that it served to drive deep the roots of prejudice in the Cleveland community; that a pre-trial proceeding may be relevant to a determination of the eventual trial has already been decided by this Court, *Estes* v. *Texas*, 381 U.S. 532.

The publication of the names of the veniremen in all three Cleveland newspapers twenty-five days in advance of trial was asserted by petitioner in his petition as one of the circumstances contributing to the unconstitutional nature of the proceeding now called his trial (Ra 6a),

stipulated to as having been the fact by both sides (Ra 298a), and noticed by the District Judge (Ra 406a). But the author of the majority opinion below has asserted as his personal experience the propriety of this procedure (Rs. 8, n.3), and can discern no vice in what occurred. If personal experience is of any worth the signatories to this brief do *not* recognize such publication as common practice in the various locales wherein they reside and practice law. But notwithstanding such disparity of professional experience, the practice of pre-publicizing the identities of citizens shortly to be charged with the disposition of serious and controversial criminal cases ought to be severely condemned. The evil inherent in such a situation is obvious: The moment one learns that one's neighbor is about to be a candidate for jury duty in a case which has provoked the community, the temptation to discuss the matter is irresistible. Such discussions cannot help but promote a concentration of information of every type and source being foisted off upon the talesman, until by the time he is finally impanelled he is so infused with extraneous information that impartiality is impossible. Although in cases where the defendant is highly popular such circumstances might militate to his benefit and prejudice the case for the government, we think that in the usual situation, human nature being what it is, the fact of indictment and impending trial is most likely to smoke out myriad stories about the accused which cast him as a bad type, always known to the informed as one who would probably wind up in such ignominy. There is little to be said in favor of informing the community just who will be the jurors in an important criminal trial, while there is a strong likelihood that prejudice to the defendant will be the result. We respectfully ask this Court to rule that publication of the names and addresses of the

veniremen, in all of the circumstances, entitled petitioner to either a continuance, or a change of venue, or both.

While we have vigorously emphasized the misconduct of the news media in general and the Cleveland Press in particular as the pervasive and primary vice in the pre-trial atmosphere, we are constrained to agree with the dissent below (Rs. 61) that the ultimate failure may have been judicial. Faced with the venality of the environment from which a jury had to be selected, the trial judge failed to take corrective steps. He did not invoke any of the safeguards and protections available in such cases. Although detailed argument of his failure is appropriate to this section, it is also germane to that portion of this brief dealing with the conduct of the trial judge as a whole, and to avoid redundancy we will discuss it there.

C. *Publicity During Trial:* As the record indicates, and the opinions of lower state and federal courts point up, Trial Judge Edward Blythin deferred defense motions for a continuance or a change of venue until the results of the voir dire examination of the jurors were before him. After impanelling thirteen jurors who stated that they were impartial, Judge Blythin denied all motions and proceeded with the trial. The District Judge found as a fact that the self-serving declarations of the talesmen could not be trusted in the hopelessly prejudicial atmosphere which prevailed (Ra 443a). The majority below set aside this factual determination as "clearly erroneous" (Rs. 113). It is therefore left for this Court to decide whether to apply the principles of *Irvin* v. *Dowd,* 366 U.S. 717, or *Rideau* v. *Louisiana,* 373 U.S. 723; or, indeed, whether the case at bar because of its unique facets must be tested by wholly new rules.

As the voir dire discloses, eleven of the jurors had read about the case prior to trial. In view of the material made

available by Cleveland newspapers in the three-month period prior preceeding trial, we believe that these admissions to having "read" about the case warranted the District Judge in applying *Rideau*. The available material generally and repeatedly announced Dr. Sheppard's guilt, and castigated him for failing to "cooperate" by confessing.

And even under the *Irvin* doctrine, this jury was not, as the trial judge (who had himself fallen victim to the prejudicial publicity) ruled, sufficiently impartial to pass muster. In support of this contention we cite two examples arising from the voir dire.

Juror Howard Barrish was perhaps the most candid. He disclosed that since the day he had learned that he was to be in the Sheppard jury pool he had diligently followed the case in the news media, reading all that he could so that ". . . if I was chosen I'd know something about the case." (Tr. 62) Suffice it to say that almost all of what Juror Barrish could have learned in this twenty-five day period must necessarily have equipped him specially to hear the Sheppard case—and to find Dr. Sheppard guilty. If Mr. Barrish did in fact pay careful attention to news of the case during the period in question, it is likely that he continued to supplement the drear of court proceedings with the much more lively offerings of the Cleveland Press (cf. Rs. 126-127).

At the other extreme was Mrs. Elizabeth Borke, the twelfth juror. She admitted that she received the Cleveland Press daily at her home, and nonetheless asserted that she had heard nothing about the Sheppard case. If ever there was justification for rejecting the sworn statements of a prospective juror, this was it. We can only assume that Mrs. Borke wanted very much to be chosen, and had gotten the word from some sources that the only avenue to acceptance was that of professed impartiality.

As the jury was being selected, the Press bannered its penetrating question "BUT WHO WILL SPEAK FOR MARILYN?" (Rs. 126) atop a four double-column innuendo which cannot be described as either article or editorial. It was a frank plea to the whole community to take pity on the poor decedent, the aggrieved and real party in interest, who was prevented from testifying only because her husband had killed her. We specifically invite the respondent, and the *amici curiae* from Cuyahoga County to provide one iota of explanation, justification or mitigation for this damnable and deliberate outrage. Certainly this tactic must represent the nadir of American journalism, and just as certainly it required a continuance or change of venue, or both.

On a second occasion the Press elicited ghostly testimony from the grave. On November 24, 1954, as the prosecution's case drew to a close, the Press bannered the asserted fact that Marilyn had viewed Dr. Sam as a "Jekyll-Hyde". The expected testimony of the "bombshell witness" was set forth on page one: Thomas Weigle, Marilyn's cousin, was ready to reveal the following day that she had used this exact term in describing the duality of her husband.

Of course in no jurisdiction in the United States (including Ohio) would such testimony have been admissible if it were available; and of course Thomas Weigle did not, when he did take the stand, offer such testimony. Nonetheless, on November 24 the jurors were in their homes in the evening, and many of them received the Cleveland Press, an evening newspaper.

The respondent seeks to pass these and other Press travesties aside as mere "inane and innocuous" reporting (Rs. 26). Neither article was by any means innocuous, and we doubt that either sprung from its author's inanity. We think both were calculated to help the Press avoid the consequences of an acquittal by promoting illegally a con-

viction. The "WHO WILL SPEAK FOR MARILYN?" effort conditioned prospective jurors on the eve of trial to believe that petitioner killed his wife before any evidence was heard. The "JEKYLL-HYDE" article was a deliberate effort to put before the jury false prejudicial and inadmissible material designed to fill the dangerous gap between petitioner's demonstrably phlegmatic nature and the manifest ferocity of Marilyn's killer. By characterizing a devoted and peaceable doctor (Jekyll) as "Mr. Hyde" (a sanguine monster) the Press supplied the essential link between defendant and crime which the prosecution could not provide with legitimate proof. We suggest that those jurors who read this article—or even saw the banner headline—cannot help but have noted this startling revelation and later wondered how Sam's lawyers had been clever enough to prevent Marilyn's statement from coming out in testimony.

Available to the trial judge whose decision it was to proceed forthwith in Cuyahoga County despite the pretrial publicity of which he had been made well aware, were several methods of attempting to preserve such impartiality as might have been captured during the impanelling. The first, most obvious and most effective would have been sequestration.

Petitioner alleged at the outset of this case (Ra. 7a) that the failure to take the jury into the custody of the court and shield it absolutely from extrinsic influence, was under the circumstances, a federal constitutional violation. Judge Weinman did not specifically pass upon the point, but both the majority (Rs. 9) and the dissent (Rs. 61) below gave it notice, from conflicting viewpoints. The majority bottom their conclusion that no error was committed on the ground that the record discloses no motion by the defense for sequestration.

But we think this to be no sufficient answer to petitioner's allegation. Unfortunately, petitioner's trial counsel, the

late and able William J. Corrigan, is now deceased and thus cannot explain what if any reason he might have had for failing to so move. But the majority below have speculated that Mr. Corrigan *did not want* the jury locked up (Rs. 9) so that they might enjoy the relaxation and refreshment of living at home, thus being in too benign a frame of mind to impose the death penalty; and the majority have done this speculation in the guise of refusing to speculate.

Second-guessing the moves of counsel embroiled in a high-powered, high-pressure murder trial eleven years after the event is at best a dangerous practice and hardly the appropriate plasma with which to sustain a whisper of life in a constitutionally sick conviction. We do know that Mr. Corrigan strenously objected to any trial at all. We may safely assume that he thought the trial judge would exercise some degree of control over the news media, instead of throwing up his hands in impotence each time a news invasion was brought to his attention (Rs. 60). It may be that he wanted and expected a mistrial (to which, we contend, he was in several instances entitled), and thought that this method would best serve and protect his client's rights.

In any case, if the trial judge intended to act with the *laissez faire* shown upon the record, we respectfully submit that he did indeed have a duty to sequester the jury *sua sponte*, and that the holding of the court below is plainly incorrect. It is clear that Dr. Sheppard had a right to have the integrity of his jury thus protected, and nothing in the record can be offered to show a waiver of that right, cf. *Fay* v. *Noia*, 372 U.S. 391. What the majority below have in fact said is that Sam Sheppard should serve a life sentence because his defense counsel made what appears in retrospect as a serious tactical misjudgment.

We pass next to the failure of the trial judge to adequately investigate the effects upon the jurors of certain

reckless and irresponsible news broadcasts. Walter Winchell announced in the course of the trial that according to one Carol Beasley, then under arrest in New York, Dr. Sheppard was the father of her illegitimate child. (Tr. 5429) On motion of defense counsel, the jurors were queried as a body by the trial judge, and two jurors said that they heard the broadcast, but would not be influenced by it.

This measure was, we believe, inadequate. The jurors should have been interviewed one by one, and questioned much more thoroughly. Of primary importance was whether the jurors who had heard this news (and it is likely that those who did not hear the newscast directly learned about it from others) *believed* that petitioner had fathered a bastard with a woman criminal. Such belief would necessarily have infected any impartial mind with prejudice, notwithstanding any stated assertions to the contrary. This is especially true in the circumstances of this case, where the prosecution made a concentrated effort to blacken Sheppard by casting him in the role of a Lothario.

But if this inquiry was inadequate, the absolute refusal to investigate the handiwork of Bob Considine violated Sheppard constitutional rights. Mr. Considine was good enough to voice an opinion on radio, during trial, that petitioner reminded him of Alger Hiss as he denied his guilt. (Ra. 448a) Alger Hiss was at the time nationally known to be a convicted perjurer. Thus in the view of the experienced and trial-wise Mr. Considine, Sam Sheppard was a liar. It would be foolish to say that a layman, unschooled and undisciplined in evidentiary jurisprudence could completely disregard the stated opinion of so considerable an expert.

The trial judge, as was his wont, reacted to this incident by saying "the court can't control everybody." He then went on to say that he would not control his jury by

questioning them because, "We are not going to harass the jury every morning." (Ra. 448a)

The District Judge found this refusal to be of constitutional significance. The majority below endorsed the position of the trial judge as discretionary, and added the following remarkable observation:

> "We believe that this action was itself within the discretion of the judge, and that it may indeed have been the best thing to do. A discreet judge might well conclude that repetitive reference and inquiry as to matter prejudicial to the defense would harm rather than help. A substantial number of lawyers skilled in the art of advocacy would, we think, agree." (Rs. 30)

What this substantial number of trial advocates might feel—if indeed any of this ilk could be assembled, which we respectfully doubt—is not material, for Mr. Corrigan was charged with defending Dr. Sheppard and he *did* specifically request inquiry. Mr. Corrigan is the only skilled advocate—and his ability as a trial lawyer the court below was frequently at pains to acknowledge (Rs. 9, 49)—with which this case is concerned. Nor would a decision by the trial judge to withold interrogation as a boon to Dr. Sheppard be in any sense a correct exercise of discretion. He was not counsel for the defense, and had no right to supervene the judgment of Mr. Corrigan as to what rights ought to be waived once they had been asserted. This failure to adequately blanket the jury from extrinsic influence, coupled with the failure and refusal to investigate the effects of highly prejudicial material to which the jury was known to have been exposed, vitiates, we believe, the conviction on constitutional grounds. This is especially true since the trial judge at no time ever *ordered*—as the

dissent below has observed (Rs. 62)—the jury to assiduously avoid contact with news items concerning the case. We do not intimate that this would have been a sufficient protective device for such avoidance of contact in Cleveland in the fall of 1954 would have been as a practical matter virtually impossible. But this omission by the trial judge aptly demonstrates that he did not undertake to protect his jury with the vigor and care for which this cardinal responsibility called.

As one additional representative example of the sort of prejudice with which the trial community was saturated during the proceedings, we point to the attempted impeachment of the principal defense witness—Dr. Sheppard—by Cleveland Homicide Bureau Chief David Kerr (Rs. 110). Officer Kerr was never called to the stand by the State, but he announced publicly while Sheppard was testifying that he was a "bare-faced liar." This was the same David Kerr who announced on July 26, 1954, through the Cleveland Press, that had he been on the scene earlier in the investigation he would have immediately arrested petitioner for "investigation of murder" and through interrogation of petitioner would have solved the entire case in "four hours." This statement was issued by Kerr in Miami, where he had been vacationing, and where he had been able to discern that Dr. Sheppard was the guilty party—*by reading the newspapers!* Here again was the announced opinion of an ostensible expert which could not help but influence to some degree any juror who learned of it.

Our contention as to the issue concerning publicity during this trial is summarized, then, as follows:

> (1) The extent and venality of the publicity was probably sufficient to destroy any presumption of jury impartiality no matter what orders, instructions or inquiries might have been used; and,

(2) The failure of the trial judge to control or even try to control this continual infection of his jury by extrinsic material shows beyond any doubt that any presumption of impartiality is destroyed, and that *prima facie* this jury was probably biased.

D. *Disruption Of The Trial By Newsmen:* This Court has recently ruled, in *Estes* v. *Texas,* 381 U.S. 532, that intrusion upon a trial by newsmen which materially disrupts the somber decorum of the proceedings does not comport with minimum standards of due process. In that case television cameras were actually brought into court, and a small part of the proceedings were broadcast live.

In the case at bar, all but a few seats in the courtroom were assigned to newsmen by the trial judge. Aside from members of the defendant's and decedent's families, the public was barred from the trial except by special pass from the judge. (Rs. 158-164) A special room was set up adjacent to the courtroom for teletypes and other equipment. The jurors were repeatedly photographed, as was the defendant—without his consent. And the presence and activities of the newsmen was disruptive and disorderly, a situation which the trial judge did not adequately correct As examples we submit the following from the trial transcript:

"The Court: Will you wait just one moment, gentlemen, let's have perfect order until we have these matters disposed of." (Tr. 531)

"The Court: Ladies and gentlemen of the panel—let's have quiet, please—We will adjourn until 1:15 this afternoon." (Tr. 1168)

"The Court: Just one moment, please will you folks in the rear be kind enough to be very careful in moving? It just cuts off the speech and makes the

situation impossible. We will have to have quiet." (Tr. 2280)

"Counsel: I can't hear, your Honor, there is so much noise in this Court room."

"The Court: Can we have quiet in the rear, please. We will have to restrict the movements in this court room unless we have quiet. We just cannot continue." (Tr. 2326)

"The Court: Before we proceed further, it has been brought to the attention of the Court that some persons have undertaken on their own behalf to examine some of the exhibits in this case. Will all persons be kind enough to be warned now that there is no one to touch the exhibits or get near to them during the progress of this trial other than counsel in the case. Please observe that from now on." (Tr. 3075)

"Counsel: Will you allow me to finish my questions before you all laugh. Put it in the record that the audience in the rear, the reporters, television men laugh in this case where a man is on trial for murder for his life." (Tr. 3276)

"Mr. Corrigan: Will you put in the record that at this time the audience broke into loud laughter".

"Mr. Danaceau: We object to that. There was not any loud laughter."

"The Court: Yes, the Court will say it was not loud laughter. Certainly there was some laughter." (Tr. 4498)

"Mr. Corrigan: Now, let's have some quiet back here, will you, gentlemen?"

"The Court: Yes, let's have quiet, gentlemen." (Tr. 4532)

"Mr. Corrigan: Was when? I could not hear you." (Tr. 4850)

"Mr. Corrigan: There seems to be so much noise back here, your Honor, people going in and out, the door slamming. Can't we have a little quiet?"

"The Court: Unless we can have this movement decreased, the court will have to close that door." (Tr. 6251)

"Mr. Mahon: May we have an answer?"

"Mr. Parrino: We can't hear, Doctor."

"Mr. Mahon: We can't hear you." (Tr. 6260)

"Mr. Corrigan: There is so much noise out there."

"The Court: I don't know where it comes from."

"Mr. Parrino: It is in the hall, Judge. I will see if I can quiet them down."

"Mr. Corrigan: Tell them to be quiet." (Tr. 6779)

As Judge Weinman observed:

"It is one thing to accomodate the news media; it is quite different when a major portion of the courtroom is reserved for it. Here a comparatively small courtroom was reserved primarily for the news media and the trial was its showpiece. The Supreme Court of Ohio characterized the atmosphere surrounding the trial as a 'Roman holiday for the news media'. Under such circumstances the requisite atmosphere for a fair trial could not, and in fact did not, exist." (Ra 451a)

This finding of fact, which the majority below were not entitled to set aside (Rs. 113) because they could not show such findings to be, and did not show them to be, "clearly erroneous", falls squarely within the principle of the *Estes* decision. Without further belaboring the point, we submit that such tolerated and uncontrolled interference by newsmen is repugnant to our whole concept of a criminal trial; when viewed as an aggravating circumstance against the

entire framework of the Sheppard case, we believe the District Judge to have acted well within the powers granted to him in voiding this conviction.

II. THE TRIAL JUDGE WAS NOT SUFFICIENTLY IMPARTIAL TO PRESIDE AT THIS PROCEEDING, AND SHOULD HAVE VOLUNTARILY RECUSED HIMSELF:

The judge who presided at this trial, Edward Blythin, said to a court clerk before Sam Sheppard was ever arrested," . . . Sam Sheppard is as guilty as I am innocent." (Ra 456a) While the jury was being impanelled, he volunteered to the late Dorothy Kilgallen, "It's an open and shut case . . . he is guilty as hell. There is no question about it." (Ra 457a)

The trial judge assigned the case to himself, knowing full well that he was up for election early in November, 1954, at which time he would have to look for approval of his judicial conduct to the electorate. On November 3, 1954, Judge Blythin won reelection by what was described by the Cleveland News as "the most one-sided trouncing of the election" (Rs. 101).

The chief prosecuting attorney, John J. Mahon, also won judicial office on that date; Judge Blythin allowed himself to be photographed with Mahon in a pose of mutual congratulation (Rs. 101). This manifest cameraderie between the presiding judge and counsel for the State was not paralleled by any similar demonstrable relationship with defense counsel.

When highly critical motions for continuance or change of venue were pending, the Cleveland Press ran a puerile but highly laudatory congratulatory editorial praising Judge Blythin. (Rs. 20), while at the same time editorializing critically the efforts of defense counsel to collect evi-

dence of community prejudice which would force a change of venue (Rs. 21).

The District Judge ruled that under the circumstances, Judge Blythin had a duty to recuse himself or at least make his sentiments known to counsel in order that they be afforded an opportunity to file an affidavit of prejudice. (Ra 457a). Because appellate courts in Ohio continually relied upon the discretion of Judge Blythin in assessing Sheppard's various claims of error, Judge Weinman held that his state of mind was not sufficiently impartial to correctly perform such a delicate task.

Before proceeding to argue this issue on the facts set forth, we pause to mention the point that there is no glee in discussing the malfeasance of a jurist who is deceased and unable to come to his own defense. The District Judge noted his reluctance to condemn a deceased brother member of the judiciary (Ra 458a), and the majority in the court below came to Judge Blythin's defense with manifest indignance; in the process of so doing, that court ruled that he was a proper person to preside at a murder trial of these proportions, notwithstanding his asserted absolute belief in petitioner's guilt before a shred of evidence had been presented to him (Rs. 34-43). We think this latter conclusion to be plainly incorrect in principle, and in the circumstances of this case.

First, accepting as fact (Rs. 39) Judge Blythin's pretrial state of mind with respect to the merits of the case, one is compelled to ask, "How did he form this damning opinion?" While it is possible that he had the conclusions of his son, who was a member of the Cleveland Homicide Unit, as a basis (see Ra. 461a), there is no evidence to sustain such a proposition. We think it more probable under the circumstances that Judge Blythin—perhaps subconsciously—had been so personally inundated with the guilt-riddled reporting of the news media that he was

persuaded of Sam Sheppard's guilt based on what he had read. If an experienced and disciplined jurist could be so influenced, then no stronger case can ever be made out against pre-trial publicity.

But no matter what the source, he was wrong to harbor this opinion in advance of trial. This was not a case where a defendant had pleaded guilty and withdrawn his plea, as analogized by the majority below (Rs. 40). Nor had there been any preliminary hearing from which Judge Blythin might have learned of some strong proof against Dr. Sheppard. As this trial opened there had not been presented anywhere except in the news media facts indicative of guilt, and even these—more innuendo than fact—should be regarded as less than persuasive by a judge.

But if Judge Blythin was compelled to believe that petitioner was guilty by non-evidentiary forces, he could commit no more serious breach of his office than to go one further step and consider the case "open and shut." This we think to have been the greatest wrong of all. Recognition of his personal prejudice in a subjective sense should have inclined this judge to align his conduct to the highest standard of objectivity attainable, guarding every minute against the possibility that his personal bias might infect his rulings of law. Upon the evidence, we submit that in the mind of this trial judge the trial itself was but a necessary formality pointed inexorably from the outset toward petitioner's certain doom.

The majority below have misconstrued the principles of *Tumey* v. *Ohio*, 273 U.S. 510, and *In Re Murchison*, 349 U.S. 133. In both cases this Court found the circumstances to be such that the presiding judge ought not to have rendered judgment—*not* because of any specific demonstrable misconduct, but because of inherent influences inconsistent with the *likelihood* of complete objectivity:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness." (Emphasis supplied) *In Re Murchison*, 349 U.S. 133, 136.

"Every procedure which would offer a *possible* temptation to the average man as a judge * * * not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law." (Emphasis supplied) *Tumey* v. *Ohio*, 273 U.S. 510, 532.

And beyond the guidance which Judge Blythin might have received from recognition of these general principles, there had been only weeks before the trial a decision rendered by a brother judge of the Court of Common Pleas, Cuyahoga County, *in this same case.* By the criteria laid down in that decision, Judge Blythin was in no wise qualified to sit and preside over this trial:

"He must not have an opinion in advance of hearing facts. At that period in the process, he must and should have no opinion, leaving his mind open, subject to proof of established facts. To reverse this guarantee and require proof to dislodge or modify an earlier acquired notion of conviction is to subject the defendant to a process not anticipated or permitted under our laws.

In view of the circumstances surrounding the nature and investigation of the crime and other preliminaries leading to the arrest of the accused, it is not unusual or strange to find a public official of the affected community thrown into a maelstrom of conversations, accusations and rumors which are found to abound in all such occurrences. But those likely to be drawn

into the matter in an official capacity should reserve their decisions and bridle their tongues. This is especially true where the case may require their judicial determination." *State* v. *Sheppard*, 121 N.E. 440, 442. (Court of Common Pleas, Cuyahoga County, Ohio.)

The majority below have sought to pass aside the evidence of severe bias on the part of the trial judge on the ground that he is not shown to have committed any specific acts of misconduct in open court, and by quoting several of his statements for the record wherein he announced impartiality. Although we believe this measure insufficient to compensate for the inherent danger in the judge's state of mind, we think that this effort fails of its own accord.

In several instances the majority below have endorsed critical rulings by this trial judge as within his sound discretion. (Rs. 9, 30) The District Judge observed that the appellate courts of Ohio had done likewise (Ra 460a). As we understand the principle underlying the grant of discretion to a trial justice, it is thought that one on the scene when a given question is presented, who is aware of all the attendant circumstances and conditions, is usually in a better position to render some delicate judgment than are reviewing jurists who have only the cold record before them. Certainly the fate of a defendant on trial for crime is controlled to a large extent by these discretionary rulings. In this case in particular, any one of many rulings made by Judge Blythin—always in favor of the State—could easily have changed the outcome:

(1) Judge Blythin failed to disclose to defense counsel that he felt Dr. Sheppard to be guilty, or that he regarded the case as "open and shut", thus

denying the defense its right to have him disqualified.

(2) Judge Blythin denied motions for a continuance and change of venue which would have taken the case out of the hostile Cleveland atmosphere, or postponed it until emotion could simmer down.

(3) Judge Blythin went to extraordinary lengths to accommodate news media, depriving petitioner to a large extent of his right to a public trial and permitting the proceedings to degenerate to a "Roman holiday" atmosphere.

(4) Judge Blythin repeatedly failed or refused to ascertain possible infection of the petit jury after it was called to his attention that highly prejudicial and inadmissible information was being disseminated, and that the jurors were exposed to it.

(5) Judge Blythin refused time and again to declare a mistrial because of this extrinsic supplementation of the trial record with prejudicial material.

(6) Judge Blythin failed to sequester the jury despite his decision to proceed with the trial in what he knew to be a highly-charged and volatile atmosphere.

(7) Judge Blythin refused a directed verdict after admitting that the evidence, at the close of the State's case, appeared to be in equipoise. (Rs. 175)

(8) Judge Blythin refused to allow the defendant access to his own home to search for exculpatory evidence, but ruled that the home "belonged" to the police. (Ra. 150a (10))

(9) Judge Blythin refused to grant a new trial notwithstanding proof presented to him that certain court officers had committed a felony under Ohio law by permitting the jurors to have unauthorized

and unmonitored communications during their deliberations.

(10) Judge Blythin refused to grant a new trial despite evidence presented after verdict (the Kirk affidavit) which surely would have changed the result.

It may of course be pointed out that one or both of the Ohio appellate courts reviewed these acts by the trial judge, and found no reversible error. But these courts placed reliance upon the judge's wisdom and discretion without *knowledge* of his secret views.

Finally, we raise the matter of the imminent election and the propriety of the trial judge presiding at the height of his candidacy. We think this case highlights for all time the inherent weakness in the elective method of staffing the judiciary.

Certainly this was a case where the hue and cry was up for Sam Sheppard's neck in a noose. The newspapers, and particularly the Cleveland Press had proclaimed petitioner's guilt in terms ranging from innuendo to outright accusation. The community awaited the trial with hungry anticipation. That same community was to decide, during the trial, whether Judge Blythin would keep his job.

Would this judge have dared to shift the case to another county, or postpone it, even if he sincerely felt that Sheppard was entitled to such relief? Would he have had the temerity to direct a verdict of not guilty even though he was satisfied that the State had failed to make out a prima facie case? And once the State had won its victory, would this judge under any conditions have taken the bold step of setting aside such a prize verdict?

There is indeed no reason to assume that the evils of trial by newspaper come to bear only on the jury.

"Usually the possible influence of the press on other than jurors is not even considered. Yet there is no reason why judges, lawyers, witnesses and law enforcement officials should be assumed to be more immune to social pressure than the twelve people in the jury box. Witnesses—like the participants in the Harvard experiment who, under social pressure, changed their minds about the lines they observed—may, under community pressure concerning the case being tried, change their minds about what they thought they saw at the scene of the crime. Judges too are vulnerable. In most states they have to seek reelection. They may yield, in the interest of retaining popularity, without even being aware of what they are doing. Attorneys (especially prosecutors) are also subject to subtle influence. Many of them have political ambitions." Lofton, *Justice and the Press*, 6 St. Louis Univ. L.J. 449, 477.

In closing we mention the doubtful propriety of Judge Blythin allowing himself to be shown warmly congratulating Prosecutor Mahon on the latter's accession to the bench. Endorsement of counsel for either side by the presiding judge ought, we think, to be assiduously avoided, especially where such endorsement may come to the attention of the jurors. Although it is not a major point, we think this circumstance is one of the many woven into this total issue, and mention it in that light. The event described brings to mind an interesting and perhaps agonizing question: Of the twelve jurors who voted as Prosecutor Mahon asked, how many had a short time before also voted for him on the county ballot; and to what extent might this prior commitment have promoted a subconscious desire to see one's elective choice prevail in his last and greatest case as counsel for the people of the State of Ohio?

III. The Use by the State of Ohio of Lie Detector Evidence Violated Petitioner's Federal Constitutional Rights.

The stipulations submitted by both parties to the District Judge show that prosecution witnesses were allowed to testify that petitioner had refused to submit to a lie detector test, and that a state witness was allowed to testify that he *had* taken such a test. (Ra 150a (12-15)) The District Court found this to be an error sufficiently grave as to violate the federal constitution.

The majority below did not rule that this assessment of the gravity of the error was incorrect, but avoided confrontation of that question:

> "The conduct of defense counsel regarding lie detector evidence has been discussed at length because we believe it spares us the need of determining the precise constitutional question suggested by the opinion of the District Court." (Rs. 47)

The court below did acknowledge the fact that many pretrial press accounts referred to Dr. Sheppard's refusal to take lie detector tests (Rs. 43), a fact painfully apparent from the numerous clippings on the subject in the green scrapbooks. One of the grounds asserted by Mr. Corrigan in seeking to continue the case or change its venue was the widespread public awareness of this refusal. The trial judge for reasons never articulated rejected this plea. Thus it is fair to assume that some or all of the jurors had at the outset of the trial information about the rejected tests.

When the testimony of Officer Schottke and Deputy Sheriff Rossbach that petitioner had refused their requests for lie tests was received, Defense Attorney Arthur Peter-

silge somewhat tardily objected. He pointed out to the trial judge that since the results of such tests were inadmissible, a refusal to submit should also be inadmissible. The court then told the jury:

> "Ladies and gentlemen, you are not to understand by these questions that any person is obligated to take any lie detector test. A person has his own choice. He is under no obligation whatever to take it."

Mr. Petersilge then asked the judge to go further and instruct the jury that test results would be inadmissible in any case. Judge Blythin responded:

> "Well, they are not here, anyway, Mr. Petersilge * * * we need not go beyond what we have in evidence. The evidence is here that he was asked to take it, he refused. Now, the Court tells the jury he doesn't have to take it, period. We will stop right there." (Ra 150a (14))

We think it a matter of common legal knowledge that evidence of the type complained of is inadmissible in every jurisdiction in the United States, except in a few limited cases where both parties stipulate to admissibility. Evidence by a state that a defendant has refused to take a lie detector test is fully as offensive to the federal constitution as evidence that he refused to testify against himself, for no lie detector test can be conducted unless the accused is willing to answer questions while attached to the machine. Further, there is an independent ground upon which such evidence is wholly improper in any trial, beyond the provisions of the Fifth and Fourteenth Amendments; and that is that the lie detector is not considered to be sufficiently reliable to warrant the admission of test results even when

these are offered by the defense with a waiver of all right against self-incrimination.

The majority have ruled that Dr. Sheppard may not now complain of this violation of his rights because the admission of the evidence in question was the *deliberate and tactical choice of petitioner's trial counsel.* (Rs. 47-49)

This approach to the issue in question—perhaps thought to be the only route with which to skirt this difficult issue—is incorrect in numerous respects.

First, it was for the District Judge to say whether petitioner had through the acts of his counsel waived a federally protected right. *Fay* v. *Noia*, 372 U.S. 391. If he had found as a fact that deliberate waiver had occurred, and in his discretion decided to assert that waiver to bar relief, he could have done so. But it is obvious that he found as a fact that there was no effective waiver; or that if there had been one, it ought not to be interposed to deny habeas corpus.

The majority below on this as on many other occasions have disregarded this power of the District Judge and usurped it for themselves, at a time when their gross speculations cannot be rebutted by petitioner with evidence—evidence which the respondent did not seek to elicit in the District Court, although he could have done so.

There is nothing in the record to support the conclusion that Mr. Corrigan actually desired to have evidence come in regarding Dr. Sheppard's inclination to shun the polygraph. If this were the case, he would have hardly permitted his assistant counsel (Mr. Petersilge) to have destroyed his tactic by making objection and asking for limiting instructions. That the defense was aware of the inadmissibility of lie detector evidence is demonstrable by Mr. Petersilge's citation to Judge Blythin of a decided case from within that very county (presumably *Parker* v.

Friendt, 99 Ohio App. 329, 118 N.E.2d 216, decided in 1954 —see Rs. 45).

Inasmuch as no trial lawyer in his right mind would wish to have a jury learn that his client had rejected what is commonly thought to be a scientific device capable of discerning guilt or innocence, absent other circumstances, it is necessary to consider what may have motivated Mr. Corrigan's inaction in the face of such highly objectionable evidence, having in mind the conditions in which the situation arose.

It is reasonable to assume we think, that Mr. Corrigan was satisfied that each and every juror knew about the lie tests and Dr. Sheppard's having declined to submit. He may well have felt that since he was wrongly forced to face a jury forearmed with such knowledge, objection to the evidence would only serve to highlight its apparent importance and that the better method would be to meet and explain it—something he should not have been forced to do. If his failure to vigorously object *was* a tactical maneuver, this certainly is the only reasonable explanation for it—and petitioner can hardly be penalized in the circumstances.

But the conduct of Mr. Petersilge—which Mr. Corrigan could easily have prevented if he had made a deliberate decision with respect to this decision—tends to undermine all possible theories of knowing and purposeful waiver. It is probable, in all of the circumstances, that Mr. Corrigan simply failed to grasp the enormity of the error which was being committed because of a lack of familiarity with this area of evidentiary law, and did not realize what absolute grounds for objection were presented. His many earlier attempts to obtain a mistrial suggest that he would never knowingly have passed by an opportunity of this sort.

This latter view is supported by the failure of defense counsel to press this issue on appeal, notwithstanding their omission to except to the inadequate limiting instructions

of the trial court. Additionally, there is implicit in the appeal by the defense of the testimony by *Houk* that he *had taken* a lie test (Ra 150a(15)), also inadmissible in any American jurisdiction, a recognition of the impropriety of lie test evidence in *some* context.

In any event, there is far too much speculation necessary to fabricate from this confusing and conflicting record circumstances showing waiver. This is doubtless why the District Judge did not pause to deal with this issue at length. The majority below should have respected his findings in this regard, instead of taking it upon themselves to put together a skein of shaky suppositions after the evidence at the hearing level had been closed.

IV. Unauthorized Communications to the Jurors During Deliberations Violated Petitioner's Right to Due Process of Law.

As the opinion of the Court of Appeals discloses, members of the Sheppard jury made certain telephone calls which were not authorized by the trial court. This was done in violation of two Ohio statutes. Section 2945.32, Ohio Revised Code, provides an oath to be administered to bailiffs in charge of a sequestered jury; it further provides that an officer violating this oath—as these officers did, unquestionably—may be punished by imprisonment for one to ten years. Section 2945.33, Ohio Revised Code, specifically prohibits any communication to a juror by an outsider.

The Ohio Supreme Court, in reviewing this question, refused to apply the ordinary rule that proof of communication to a juror raises a presumption of prejudice which stands until rebutted. *State* v. *Sheppard*, 165 Ohio St. 293, 298, 299. Ra 113a. The District Judge viewed this as a misapplication of Ohio law, but held that under the circumstances due process had been violated in any event. Ra. 473a.

The Court of Appeals rejected this ruling and held in essence that because defense counsel produced no actual evidence or prejudicial content in the telephone conversations, there was no error.

As the record discloses, the bailiffs from whose phones these calls were made did not dial the numbers or hear the voices of the parties called. In view of this we think the Ohio Supreme Court's pure speculation that these conversations were innocuous, and consisted of no more than "assurances of health and welfare" by the jurors' loved ones, to be completely unwarranted.

A leading case in this area of jurisprudence was twice before this Court in recent years. *Remmer* v. *United States*, 347 U.S. 227; *Remmer* v. *United States*, 350 U.S. 377. In that case it had come to the attention of the trial judge that a remark suggesting a "fix" had been made to a juror, and that subsequently an F.B.I. agent had questioned the juror while investigating possible jury tampering. Upon the first grant of certiorari it was determined that the record was inadequate to determine the possibility of prejudice and the case was remanded to the District Court for a hearing upon the merits, with the following admonition:

> "The presumption is not conclusive but the burden rests heavily upon the government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. Mattox v. United States, 146 U.S. 140, 148-150; Wheaton v. United States, 8 Cir., 133 F.2d 522, 527." *Remmer* v. *United States*, 347 U.S. 227, 229.

The District Court held a hearing as directed, and determined that there had been no prejudice to the defendant. In reversing and ordering a new trial, this Court held that

the evidence of extrinsic influence vitiated the judgment of conviction. *Remmer* v. *United States*, 350 U.S. 377.

In *Mattox* v. *United States*, this Court ruled that:

> "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least until their harmlessness is made to appear." *Mattox* v. *United States*, 146 U.S. 140, 150.

In reliance on this rule, the District Judge held that "There is nothing in the record to show the harmlessness of that part of the telephone conversations which the bailiffs could not hear. Accordingly petitioner's constitutional rights were violated." (Ra 474a)

The majority below flatly refused to apply this presumption, and ruled further that Mr. Corrigan should have adduced the content of the telephone calls when he had three jurors on the stand at the post-trial hearing where he sought to prove that such calls had been made. (Rs. 54)

In the peculiar circumstances of this case in general, and these deliberations in particular, any conjecture as to the harmlessness of these conversations—even *if* they involved solely juror's families, which the record does not show—is wholly unwarranted. This jury deliberated nearly five full days. They were locked up at a time when the Christmas holidays were nearly upon them. It is probable that their families were receiving a multitude of questions and opinions from friends and neighbors. In view of the fact that the Cleveland Press had the audacity to invade a juror's home during the course of the trial (Rs. 108), we have no assurance that this was its only visit.

Without knowing the exact text of those conversations which did take place—even to the inflection of the voice of

the third parties involved—we have no way of being sure that one or more jurors on the fence of acquittal did not get the idea from his or her spouse that such a result could inspire ostracism by the community. If any spouse believed this to be true, it would be almost beyond human temptation to resist some manifestation, subconscious or otherwise, of this grave personal fear.

In view of the stiff penalties Ohio exacts for violation of its unequivocal mandate prohibiting its court officers from permitting such outside communication (Section 2945.32, Ohio Revised Code), the refusal of the majority of the Ohio Supreme Court to reverse on this ground is evidence that that court unduly strained to prevent the collapse of this defect-riddled conviction. The District Judge pointed out quite clearly that he believed Ohio should have ruled that this incident required a new trial, but bottomed his holding on due process grounds nonetheless. (Ra 473a)

Certainly this issue is of sufficient general importance as to need clarification here. If the presumption proclaimed by *Mattox, supra*, is to guide litigation and decision of questions of this kind arising in state prosecutions, the lower federal courts should be so instructed. We believe that the language of the *Mattox* and *Remmer* cases clearly relates to a matter sufficiently critical and fundamental as to give it federal constitutional dignity, and that this Court should specifically affirm the ruling of the District Judge.

V. Other Questions—The Court Below Failed To Adequately Review Certain Significant Federal Constitutional Issues Presented By Petitioner.

Set forth in our petition for certiorari are certain other issues raised by the original petition foı a writ of habeas

corpus and briefed for but not passed upon by the District Court, which ruled that:

> "Each of the aforementioned errors is by itself sufficient to require a determination that petitioner was not afforded a fair trial as required by the due process clause of the Fourteenth Amendment. And when these errors are accumulated, the trial can only be viewed as a mockery of justice. For this reason, it is not necessary to consider the remainder of the 23 stipulated issues, which range from having significant merit to no merit at all." (Ra 475-76a)

The majority below stated that ". . . we have considered and found without merit the other claims of constitutional vice in the judgment convicting Dr. Sheppard." Rs. 57

These issues were *fully* briefed by both sides in the District Court, and those briefs are available for examination here (Ra 151a-294a)

We do not seek to impose upon this Court by asking it to decide these remaining questions without the benefit of lower court litigation. We do submit, however, that the summary phrase employed by the majority below, articulating no rationale for disregarding clear rulings by this Court in other cases (cf. arraignment without counsel, *Hamilton* v. *Alabama*, 368 U.S. 52), is woefully inadequate review and does not comport with the requirement of "full and fair" litigation of constitutional claims. *Townsend* v. *Sain*, 372 U.S. 293.

Of these questions reserved but not overruled by Judge Weinman, we suggest that at least one does indeed have significant merit. The stipulations and other materials show that the Bay Village Police virtually took over Dr. Sheppard's home from the day of the murder until the jury's verdict was in. Dr. Sheppard's letter demanding

that his realty be returned to him (Rs. 157) was to no avail; and at a point when Mr. Corrigan actually had these keys in his possession in the courtroom, in response to a subpoena, the trial judge ordered him to return them on the ground that they "belonged" to the police. (Ra. 150a(11))

These circumstances in and of themselves are, we believe, sufficiently egregious to warrant a presumption that Dr. Sheppard's rights were violated in flagrant disregard of the Fourteenth Amendment. Even though law enforcement officials may have had a right to search—which Dr. Sheppard permitted them to do for one and one half months—they did not thereby take title to his real estate.

In *Levin* v. *Blair*, 17 F.2d 151 (— Cir.), a warrant had been obtained for the search of defendant's brewery establishment. Pursuant to this warrant the entire premises were seized, and guards posted on the property. The court held that (p. 153) "Search warrants have nothing to do with real estate, beyond a search of it, and the officers have no right of possession, or to remain on the premises for a longer time than is reasonably necessary to execute the writ."

In *United States* v. *63,250 Gallons of Beer*, 13 F.2d 242 (— Cir.), the court ruled that a search warrant ". . . is not a writ in the nature of an attachment, directing a levy to be made upon the property found, entitling the officer to place keepers in charge of it on the premises searched . . . Undoubtedly the warrant carries with it the right to remain on the premises to be searched so long as it is reasonably necessary to complete the search and remove the property which he is authorized to seize. His continued presence after such reasonable time is without warrant of law." 13 F.2d 245.

And in *United States* v. *American Brewing Co.*, 296 F.2d 772, 777 (— Cir.), it was held that ". . . there is no authority conferred by a search warrant to search real estate. This

means that *it cannot be 'padlocked' or the possession of the owner in any way disturbed,* interfered with, or in any way curtailed excepting so far as may be reasonably necessary to the lawful execution of the search warrant." (Emphasis supplied)

The illegal seizure and maintenance of possession of this house by officials violated petitioner's right to a fair trial because it deprived him of a reasonable opportunity to discover evidence which might exculpate him at the place where it was most likely to be found—at the scene of the crime. We submit this as a due process violation because it denied him "an opportunity to present every available defense." *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 168.

And in fact, we are able to show that this wholly improper and totalitarian conduct by the police probably did cost petitioner his verdict of acquittal. After the trial Dr. Paul Leland Kirk made an intensive investigation of the premises, and found evidence of blood in the murder room which could not have come from Dr. Sheppard or the victim. This piece of corroborative evidence would surely have instilled reasonable doubt in a jury which deliberated five days without it, and caused them to find that Dr. Sheppard's claim that one or more intruders had been in the bedroom that night was proven.

If the majority below did in fact recognize and consider this claim of constitutional violation, as well as the others reserved by Judge Weinman, we submit that they had an inescapable duty to illumine their bases for holding harmlessness. In failing to do so, they unconscionably deprived this petitioner of the review which these circumstances compelled.

As to those other errors briefly mentioned in our petition for certiorari (pp. 35-39) we rely upon their statement there. It is not proposed that their merits be reached in

this proceeding, but only that they be considered in determining whether they have been sufficiently litigated, and whether they may comprise some part of an aggregate of error which requires a new trial.

VI. The Sufficiency Of The Evidence Has Not Been Adequately Litigated Below.

In his petition asking that a writ of habeas corpus issue, petitioner claimed that the Supreme Court of Ohio had used a constitutionally impermissible standard in deciding that the evidence on record would support a conviction. Judge Weinman specifically ruled that he would not pass upon this issue: he did not rule that it had not been properly presented. (Ra 403a) The majority below made no effort to summarize any evidence tending to show that petitioner had killed his wife, but deferred to the summary of the Court of Appeals of Cuyahoga County as having demonstrated that the record was not so barren of evidentiary support as to violate due process. Rs. 58

This ruling must be sharply challenged, for the attempt by the Court of Appeals of Ohio (Ra 63a-80a) did not in fact approach accomplishment of its asserted objective of making out a circumstantial case against petitioner. All that was ever proved at trial was that Marilyn Sheppard had been murdered by someone. Any reasonable and objective view of the total circumstances of the case compels the conclusion—reached by Judge Kingsley A. Taft, dissenting in the Ohio Supreme Court (Ra 119a)—that Dr. Sheppard did not kill his wife.

We realize that this Court does not ordinarily reach the question of the sufficiency of the evidence in habeas corpus proceedings involving state convictions, and we do not ask that it do so now. But we do urge review of this issue to the extent that it be determined that further inquiry is

necessary before it can be resolved. The rules imposed upon the jury in accordance with Ohio law required them to acquit petitioner unless they found from the evidence no reasonable hypothesis save that of guilt. We think this could not have been done, and submit that in view of all of the other defects in this trial there can never be assurance that what would have in detached and dispassionately objective scrutiny appeared to the jurors as less than persuasive evidence that Dr. Sheppard was in any way responsible for his wife's demise, in the total circumstances of this case took on a twisted and warped aspect which tipped them over the fence to guilt.

VII. The Accretion Of Error As a Deprivation Of Due Process:

The majority below, in summarizing its assessment of the claimed constitutional violations which it had examined, observed that:

> "... we are unable to attribute to a combination of these several claims a constitutional potency they lack individually." (Rs. 56)

But Judges Weinman and Edwards both declared that a combination of error may require appellate relief where none of the individual errors, viewed in isolation, would do so.

In *Getchell* v. *United States*, 282 F.2d 681, 691 (5 Cir.), the court reversed certain mail fraud convictions with the following language:

> "Whether or not the failure to rule on that objection was error calling for reversal, or any one of the foregoing occurrences would, by itself, be plain error, the cumulative effect of all of them makes it all too prob-

> able that the jury's verdict was brought about, not by the weight of the evidence, but by the foregoing and other appeals to sympathy, passion and prejudice which the district court left unreproved."

In setting aside Judge Weinman's judgment and order, the majority adopted as their technique the isolation and dissection of each claimed violation wholly out of context of the proceeding in which it arose. While there may be errors so flat and final that no reference to the texture and weave of the trial fabric of which it is a defective thread is thought necessary, certainly no group of errors can be realistically evaluated without relating them to the entire background facts of the case.

While we vigorously contend, as the District Judge found, that the record in the case at bar discloses several transgressions of sufficient moment to require the issuance of the writ individually, we also assert that upon a view of the whole case there is no reasonable way to say that it is contained within the allowable perimeter of the Fourteenth Amendment. The combination of violations do indeed have a potency which perhaps no single violation has in and of itself: for whereas the issuance of the writ of habeas corpus is justified upon several distinct grounds, the accretion reduces what was supposed to have been a fair trial in the United States of America to an insult to the due process of law which is its backbone.

Conclusion

For the reasons stated above it is respectfully submitted that the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed, and the judgment of the United States District Court for the Southern District of Ohio affirmed with directions that petitioner remain

on bail unless and until the State of Ohio elects, within sixty days of the rendition of final judgment by this Court, to retry petitioner for murder in the second degree.

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